

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE LITIGATION**

) **MDL No. 1456**

) **Master File No. 01-12257-PBS**

) **Judge Patti B. Saris**

THIS DOCUMENT RELATES TO:
State of California, *ex rel.* Ven-A-Care v.
Abbott Laboratories, Inc., *et al.*
CASE No: 1:03-cv-11226-PBS

STATUS REPORT-NOVEMBER 1, 2006

The undersigned counsel, on behalf of plaintiff STATE OF CALIFORNIA
("CALIFORNIA") hereby submits the attached Status Report to the Court in accordance with the
Court's June 17, 2004 Procedural Order.

Respectfully submitted,

BILL LOCKYER
Attorney General for the State of California

Dated: November 1, 2006

By: /s/ Nicholas N. Paul
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MDL 1456 Status Report
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First Amended Complaint in Intervention

Plaintiffs filed a First Amended Complaint in Intervention (FAC), with redacted exhibits, on August 25, 2005 (No. 1679). Plaintiffs also filed a motion for leave to file unredacted Exhibits under seal (Exhibits A-K and Exhibits M-R to the FAC) (Nos. 1680, 1703), which the Court granted via electronic order.

State of California's Election to Decline

On September 9, 2005, California filed a motion for leave to file "State of California's Election to Decline as to Certain Defendants and Allegations" under seal (No. 1707), which the Court granted on September 14, 2005. The Election to Decline was filed under seal on September 14, 2005 (No. 1717).

***Qui Tam* Plaintiff's Notice of Election/Dismissal**

On September 12, 2005, the *qui tam* plaintiff (relator) filed a motion for leave to file its "Notice of Election to Proceed and Notice of Dismissal" ("Notice of Election/Dismissal") under seal. The Court granted the motion and the Notice of Election/Dismissal was filed under seal on September 14, 2005 (No. 1718); however, the Motion was not further acted upon. Since then, the Relator, in consultation with the State, has identified the additional claims and defendants that it will proceed against with or without State intervention, and the State is determining whether it will intervene with respect to additional claims and defendants. Relator intends to file a Second Amended Complaint, and the State will make its further elections and declinations. Accordingly, the Relator shall withdraw its "Notice of Election/Dismissal."

Case Management Order (CMO) 18

On December 13, 2005, the Court issued CMO 18 (Nos. 1944, 1968), providing a briefing schedule for the served Defendants' Motions to Dismiss, as well as rules regarding the scope of discovery and document access pending a decision on Defendants' Motion to Dismiss.

Motions to Dismiss

On January 17, 2006, the served Defendants filed a Joint Motion to Dismiss Plaintiffs' First Amended Complaint in Intervention (Nos. 2047, 2051). In addition, Abbott Laboratories Inc., B. Braun of America Inc. and ZLB Behring LLC filed individual Motions to Dismiss (Nos. 2045, 2049, 2050), and Defendants Boehringer Ingelheim Pharmaceuticals, Inc. and Boehringer Ingelheim Corporation later filed reply briefs claiming the FAC should be dismissed under Fed. R. Civ. P. 9(b). Briefing on the joint and individual motions was completed on April 17, 2006 (Nos. 2181-85, 2343, 2344, 2346-49, 2427-33).

Hearing on Defendants' Joint and Individual Motions to Dismiss

On May 22, 2006 the Court heard argument on Defendants' joint and individual Motions to Dismiss. No orders have been issued.

Additional Miscellaneous Filings

(1) On January 18, 2006, Plaintiff California filed a Motion to File under Seal its Ex Parte Application for a partial lifting of the seal (No. 2061). The Court granted that Motion on January 27, 2006 (No. 2090), and granted the partial lifting of the seal on February 2, 2006.

(2) On January 27, 2006, Plaintiff California filed a Motion to File Under Seal a Stipulation and Proposed Order to Extend Seal of Relator's First Amended Complaint as to certain specific Defendants (Nos. 2093-95). The Court granted the Motion to File the Stipulation Under Seal on February 16, 2006. The Court approved the Stipulation on February 17, 2006, but

reduced the duration of the seal period. On May 9, 2006, California filed another Motion to File Under Seal a Stipulation and Proposed Order to Extend Seal of Relator's First Amended Complaint as to certain specific Defendants (No. 2532), which the Court granted on May 18, 2006.

(3) On March 16, 2006, the court granted a joint motion to stay the response for Lipha, S.A. and Merck KGaA and ordered that a proposed scheduling order be submitted within 30 days (No. 2252, filed March 14, 2006). On April 11, 2006, certain Defendants and Plaintiffs jointly submitted a proposed CMO to the Court (No. 2414), which sets a proposed briefing schedule for the four foreign Defendants on whom service is either in progress or has been recently effected, which would initiate a briefing schedule based on the date of service on the last-served foreign Defendant. The CMO has not yet been approved by the Court. Service has been completed on three of the four foreign Defendants named in the FAC.

(4) On April 28, 2006, Plaintiffs filed a Stipulated Motion for an Order Permitting the Deposition of Harvey Weintraub, notwithstanding the discovery stay imposed under CMO 18 (No. 2497). The Court granted that motion, verbally, on May 22, 2006 at the conclusion of the hearing on Defendants' Motion to Dismiss the FAC. Although Mr. Weintraub appeared for a deposition in September 2006, counsel for Plaintiffs were not able to depose him due to time constraints imposed by Mr. Weintraub's limited availability and the number of other plaintiffs present at the deposition; consequently, Plaintiffs (as stated on the deposition record on September 22, 2006) reserve the right to notice his deposition at a subsequent point in this matter once party discovery has commenced.

(5) On June 12, 2006, Defendants filed a Motion for Leave to File a Supplemental Brief in support of their Motion to Dismiss the FAC (No. 2675), with the brief attached as an

exhibit. On June 20, 2006, Plaintiffs filed a Motion for Leave to File Objections to Defendants' Supplemental Brief (No. 2736), with the Objections attached as an exhibit. The Court has not ruled on either motion.

(6) On July 20, 2006, Plaintiffs dismissed Defendant McGaw, Inc., without prejudice, pursuant to a stipulation between Plaintiffs and B. Braun Medical Inc., attached to the Notice of Dismissal.

(7) On July 26, 2006, Plaintiffs filed a Motion for Leave to File a Supplemental Submission (No. 2919), pursuant to the Court's request at the May 22, 2006 hearing, intended to provide samples of the claims filed by Medi-Cal providers for reimbursement regarding the Defendants' drugs at issue in the FAC, with the Supplemental Submission attached as an exhibit. Defendants filed an Opposition (No. 2952). On September 11, 2006 the Court issued an electronic order granting Plaintiff's Motion, and the Supplemental Submission and its accompanying Exhibits A - E were filed on September 12, 2006 (Nos. 3095-1 through 3095-6). On October 5, 2006, Defendants filed a Motion for Leave to File Defendants' Response To Plaintiffs' Supplemental Submission In Response To The Court's Request For Claims Examples (No. 3170). The Court has not issued an order granting that Motion and Defendants' Response has not been filed.^{1/}

Anticipated Filings

In addition to the Reply noted in footnote 1, California may file additional motions or pleadings, under seal when necessary, to dispose of the State's interests in matters remaining under seal. Plaintiffs will request a Status Conference and the entry of a Case Management Order

1. On October 3, 2006, counsel for Defendant Abbott discussed Defendants' intention to move for leave to file a Response with counsel for California, who responded that Plaintiffs would not oppose that motion (i.e., No. 3170), but reserved the right to file a Reply should the Court order Defendants' Response to be filed.

by a motion to be filed after the Court has adjudicated the served Defendants' joint and individual Motions to Dismiss. In addition, the Relator will file its Second Amended Complaint with respect to the remaining Defendants and claims on which California has thus far declined to intervene.

CERTIFICATE OF SERVICE

I, Nicholas N. Paul, hereby certify that on November 1, 2006, I caused a true and correct copy of the foregoing, **STATUS REPORT-NOVEMBER 1, 2006**, to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2, by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ Nicholas N. Paul
NICHOLAS N. PAUL
Supervising Deputy Attorney General